United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-1213

To be argued by
MARTIN E. GOTKIN

B
P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

PEDRO LIND,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF and APPENDIX

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Table of Cases

Statutes and Rules Cited

Questions Presented

I Did the court below err in precluding defense counsel to fully cross-examine the kidnap victim as to her prior juvenile involvement with the police, her juvenile adjudication and all the underlying facts concerning same?

II Did the court err in not suppressing the confession allegedly made by the Appellant to the F.B.I.?

III Was there sufficient evidence presented to sustain the Appellant's conviction?

STATEMENT PURSUANT TO RULE 28 (3)

Preliminary Statement

APPELLANT, PEDRO LIND appeals from a judgment of the United States District Court, Southern District of New York (Stewart, J.) Convicting him of transporting a kidnapped person in interstate commerce (18 USC 1201 (a) and 2); Receiving ransom in connection with a violation of 18 USC Section 1201 (18 USC 1202 and 2); Transmitting in interstate commerce a telephone call, containing a demand for ransom for the release of a kidnapped person (18 USC 875 (a) and 2); Using a firearm to commit a felony 18 USC 924 (c) (1) and (2); and the conspiracy so to do (18 USC 1201 (c).

Appellant was sentenced to a period of imprisonment of forty (40) years on each of five (5) counts to run concurrently.

Facts

The appellant PEDRO LIND was named, along with HECTOR LUIS PEREIRA, in a five-count indictment (76 Cr. 83) charging conspiracy to kidnap, kidnapping, receipt of ransom

money, transmitting an interstate communication demanding payment of a ransom, and use of a firearm to commit a federal felony.

The chief government witness in the case was KATHLEEN ANN LUTZEN, a seventeen (17) year old Paramus High School student who testified that while walking near her home on the evening of January 13, 1976 she was forced into a car at gunpoint by two (2) males after they had stopped her to ask directions to the George Washington Bridge. The car was then driven to 14-16 Mount Hope Place in the Bronx where Miss Lutzen was taken to apartment 2E1, undressed and forced to perform sexual acts throughout the night upon both men. Later than night defendant PEREIRA made a demand for ransom of $2,000.00 via public telephone from the Bronx to the victim's father WARREN LUTZEN in Paramus, New Jersey. The next morning PEREIRA again called Mr. Lutzen and arranged for him to leave the $2,000.00 at noon under a taxi cab parked at 176th Street and Jerome Avenue in the Bronx. After the money was left, PEREIRA picked it up and walked back to the apartment, while unknown to him

he was being followed by an F.B.I. Agent. PEREIRA then took Miss Lutzen with a knit cap pulled down over her eyes out of the apartment at which time he was arrested by the F.B.I..

LIND was not found at the apartment at this time and several days later he surrendered to the F.B.I. accompanied by one JOSE OCANA who was the lessee of the apartment 2El. LIND allegedly confessed after being questioned for more than eight (8) hours by the F.B.I. agents.

The defense attempted to establish that Miss Lutzen had been hitchhiking and that she willingly accepted a ride from the two (2) men and had agreed to go to the apartment in the Bronx and willingly engaged in the sexual acts alleged. When she was fearful of what her parents would do to her and what the consequences would be, she devised the ransom and kidnapping story; the defense further attempted to show that even if it was believed that Miss Lutzen was kidnapped that she could not identify one of the kidnappers and one of her assaulters as the Appellant

LIND.

Prior to the trial a motion was made by defense counsel to suppress all physical evidence found in the apartment on the grounds that the search warrant was not proper and also a motion was made to suppress any post-arrest statements on the grounds that any such statements were not voluntary and any waiver of rights was not knowingly and intelligently made.

On March 3, 1976 a lengthy hearing was held on both of the above motions after which both motions were denied (min. of 3/3/76 Pg. 1-120).

After approximately two days of deliberation the jury found defendant LIND guilty on all counts.

POINT I

THE COURT BELOW ERRED IN PRECLUDING DEFENSE COUNSEL TO FULLY CROSS-EXAMINE THE KIDNAP VICTIM AS TO HER PRIOR JUVENILE INVOLVEMENT WITH THE POLICE. HER JUVENILE ADJUDICATION AND ALL THE UNDERLYING FACTS CONCERNING SAME.

Prior to the start of the trial and solely through the efforts of defense counsel and his investigator it was uncovered from the Paramus police department that Miss Lutzen had prior contacts with the police and the Juvenile Court. Thus, records of the Juvenile-Aid-Bureau of the Paramus Police Department which were marked as Court Exhibit 2 on 3/17/76 (A - 44) disclosed the following:

"On 10-5-71 at 12:00 p.m. she (Miss Lutzen) left her home w/o permission and remained away until 10-8-71 at 9:30 p." The "disposition" of this incident indicates that Miss Lutzen was repremanded and released: ("Rep/Rel.").

On 8/2/74 Miss Lutzen was involved in an incident where the Paramus Police noted that Miss Lutzen was "D.P.

(disorderly person) alcohol" and the disposition of the incident indicates "R/R" (reprimanded and released).

On 4-10-75 Miss Lutzen was again involved in an incident which the Paramus Police department described as follows: "Nature of incident: DP/Hitch-hiking/O.M.U.F.P." (disorderly person; hitchhiking; obtaining money under false pretenses); and under "disposition of incident" it states "Court".

All of the explanations for abbreviations were based upon defense counsel's discussions with Captain Elliot of the Paramus Police department (min. of 3-16-76 Pg. 26 - 8). Defense counsel arguing for admission of these records stated clearly and forcefully that they should be admitted under Rule 404 as character evidence and also to establish a defense that Miss Lutzen was afraid to admit that this was not a kidnapping and that her story was fabricated by her out of fear that she would be sent to an institution because of her prior conflicts with the police and the Juvenile Court (min. 3-16-76, Pg. 32).

Indeed at page 38 of the minutes of 3-16-76, while counsel was arguing the admissibility of the three

juvenile aid cards it was disclosed by the government that Miss Lutzen was "adjudicated a juvenile delinquent and was placed on probation and is making restitution of a $40.00 check". Further, Mr. VIZCARRONDO, the Assistant United States Attorney stated: "it is our information that what happened is Miss Lutzen caught a ride with an individual whom she knew to be a police officer. She was going home to her parents' from a friends house. She got into a fight with the police officer. The police officer brought her down to the station and there they found in her pocketbook the identification she used to forge this $40.00 check".

Again, we have disclosed the propensity of Miss Lutzen to hitchhike and flag down cars. Certainly, the defense had the right to cross-examine her on this crucial question to see if the jury believed that she was forced into the car on the night in question, or actually flagged down the car while hitchhiking. It must be remembered that in the cross-examination of Miss Lutzen, she stated that she was walking to a friends house to deliver a pair

of jeans and that she was ready to walk up to four (4) miles to deliver these jeans on a cold winters night of January 13, 1976 (T.T. 148). If the jury had been permitted to have before it her prior actions they may have concluded that she was lying when she said that she was not hitch-hiking and thus lying about the other parts of her testimony so that the jury could disregard her entire story.

Defense counsel clearly maintained to the trial Judge that his purpose in seeking to introduce all the prior incidents of Miss Lutzen was to show that she had the trait of being a runaway and a hitchhiker under Rule 404 (2) of the Federal Rules of Evidence (min. 3-16-76 p. 41-2).

The trial Court ruled that defense counsel could not cross-examine Miss Lutzen as to being a runaway on 10-5-71; nor the charge involving alcohol on 10-2-74, nor the juvenile delinquency adjudication in 1975. The only incident which defense counsel was permitted to cross-examine on was the hitchhiking incident on April 10, 1975 or May 16, 1976 (min. 3-26-76 p. 46-7). Certainly this tied the hands of defense counsel who could have used <u>all</u> the other incidents to great advantage and could have possibly convinced the jury

that Miss Lutzen was lying.

Rule 404 of the Federal Rules of Evidence provides in part as follows:

> "(a) character evidence generally. Evidence of person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occassion, except ...
>
> (2) character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused ..."

In addition Rule 405 of the Federal Rules of Evidence provides in part as follows:

> "... (b) Specific instance[illegible]onduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of his conduct."

It is submitted that under either rule the defense should have been permitted to cross-examine Miss Lutzen on all of the juvenile matters since running through all of them was the character and trait of Miss Lutzen to hitchhike.

Rule 609 (d) of the Federal Rule of Evidence provides in part that:

> " (e)vidence of juvenile adjudication is generally not admissible ... the Court may however ... allow evidence of a juvenile adjudication ... if the Court is satisfied that admission ... is necessary for fair determination of the issue of guilt or innocence."

Certainly in the case at bar where it is shown that in connection with being arrested on the bad check charge or related to this charge according to the last juvenile aid bureau card from the Paramus Police Department, the victim Miss Lutzen was accused or charged with being a disorderly person and hitchhiking: that evidence should have been admitted, not to attack her general credibility, but to be able to probe Miss Lutzen to show bias and prejudice motive or other state of mind to wit: that she would lie concerning the fact that she was hitchhiking so as to avoid being institutionalized or sent to a juvenile center or reform school and to avoid the wrath of her parents and school officials and to avoid other possible disciplinary measures.

In the recent case of United States v. Canniff 521 F. 2d 565 (2d Cir. 1975) that Court held that youthful

offenders or juvenile delinquency adjudications are not to be treated as Criminal convictions and should normally be inadmissible in Federal Court to attack the credibility of a defendant. However, that Court did not decide whether Federal Courts should at least allow impeachment of the witness by bringing out the underlying facts underlying the adjudication (521 F 2d. at pg. 570 note 4).

In the case at bar the evidence of both the adjudication and the underlying facts were sought to be brought out from the victim - witness KATHLEEN LUTZEN and not from a defendant. It is this writer's opinion that the holding in Canniff in no way precluded the defense counsel from questioning Miss Lutzen (a witness - not a defendant) as to both the adjudication and the underlying facts to show ...it or habit under Rule 404 and 405 (b) for a "fair determination of the issue of guilt or innocence" pursuant to Rule 609 (d).

The case of Davis v. Alaska 514 US 308 (1973) is in point. In that case the Court held in reversing the lower Court for refusing to permit defense counsel to introduce evidence of a prosecution witness' prior juvenile

adjudication for burglary that

> "(T) he (defendant's sixth amendment) right of confrontation is paramount to the States policy of protecting a juvenile offender ... Whatever temporary embarrassment might result ... to Green or his family by disclosure of his juvenile record - if the prosecution insisted on using him to make its case - is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness" (pg. 319)

The defendant LIND faced a possible life sentence for one of the most serious crimes in the Federal Criminal Code. KATHLEEN LUTZEN was not only a crucial witness, she was the complaining witness and the government's principal witness against LIND. Evidence of prior juvenile conflicts with the law were uncovered by the defense - and was not supplied by the prosecution as Brady material.

It is respectfully submitted that under all of the circumstances the defense should have been permitted to fully cross-examine Miss Lutzen and to go into all of the items on all the Juvenile Bureau aid cards as well as the juvenile adjudication for passing a bad check, including the underlying facts concerning same.

POINT II

THE COURT ERRED IN NOT SUPPRESSING THE CONFESSION ALLEGEDLY MADE BY THE APPELLANT TO THE F.B.I.

Prior to trial defense counsel made a written motion with supporting affidavit to suppress the confession allegedly made by the appellant to the F.B.I. on the grounds that said statement was not voluntary and any waiver of rights was not knowingly and intelligently made. A hearing was held on this motion on March 3, 1976 prior to selection of a jury and the motion was denied (min. 3-3-76 pgs. 70-119). A further motion was made by defense counsel after the close of the governments case and again was denied by the trial Court (T.T. pgs. 737-9)

Testimony at both the hearing on the motion to suppress and at the trial disclosed the following. That on January 18, 1976, five (5) days after the kidnapping the Appellant LIND accompanied by a supposed friend, one JOSE OCANA surrendered to the F.B.I.. It was determined that Appellant could neither read nor write English and, therefor,

Special Agent HAROLD GOSSETT who spoke Spanish, interviewed appellant. It was also determined that LIND could not write Spanish. The questioning of appellant including the booking procedures consumed approximately eight (8) hours at the F. B. I. offices. All statements were written by Agent GOSSETT and LIND only signed his name and initialed the pages.

Present during all the times was the person who rented the apartment where Miss Lutzen was held, JOSE OCANA. It was admitted that OCANA had to interpret some portions of LIND's statement for Agent GOSSETT (T.T. 695-7) There was also a time lapse of more than eight (8) hours from the time that Mr. Lind first appeared at the F.B.I. office on Sunday, January 18, 1976 at 1:35 p.m. to 10:15 p.m. when he was delivered to the Metropolitan Correctional Center. The defendant was not arraigned before a Magistrate until Monday, January 19, 1976.

Certainly, JOSE OCANA who brought LIND to the F.B.I. office and who helped Agent GOSSETT interpret, was at that time a possible suspect in the case, since it was in his name that apartment 2E1 was rented. This must be viewed with great caution and possible suspicion that the interpre-

tation he gave was not a fully correct and accurate one.

It is respectfully submitted that in the totality of the circumstances surrounding the appellant's interrogation, his statement should be held to be involuntary. See: i.e. United States ex rel Stanbridge v. Zelker 514 F. 2d 45 (2d Cir. 1975)

United States ex rel Coleman v. Mancusi 423 F. 2d. 985 (2d Cir. 1970)

POINT III

THE EVIDENCE AGAINST THE APPELLANT WAS INSUFFICIENT TO SUSTAIN HIS CONVICTION

On March 18, 1976 a "Simmons" type hearing was held out of the presence of the jury (pgs. 415 - 434) after which it was determined by the trial Judge that he would not permit an "In Court" identification of the appellant LIND.

In fact, during the entire trial, Miss Lutzen never once identified LIND as one of the kidnappers. However, she repeatedly referred to the "driver" and "passenger" of the car into which she said she was forced. At no time during the entire trial did LUTZEN identify LIND as the person who allegedly abducted her, or as the individual who made any ransom demand or received any ransom, or the individual who committed any sexual or physical assaults on her.

The appellant was never found with the victim. There was never any calls made by the appellant. No ransom money was ever found on the appellant. In addition, the only fingerprints of appellant that were found in the room were on personal items belonging to the appellant which had nothing to do with the kidnapping. There was not one item of clothing, one item

of personal belongings of the victim Miss Lutzen on which the fingerprints of PEDRO LIND were found. Indeed, there weren't even any fingerprints found on the gun in the apartment nor on the chair on which Miss Lutzen was allegedly tied to. Further, the government failed to produce any medical testimony as to the nature of the mark on the appellant's hand. The government attempted to show that the mark on appellant's hand was from the teeth of Miss Lutzen when she bit down on one of the hands of the kidnappers. It is respectfully submitted that a reading of the entire record discloses that there was insufficient evidence to sustain the appellant's conviction.

CONCLUSION

FOR THE ABOVE STATED REASON APPELLANT'S CONVICTION SHOULD BE REVERSED AND APPELLANT GRANTED A NEW TRIAL

Respectfully submitted

Dated: August 3, 1976

MARTIN E. GOTKIN
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APPELLANT'S APPENDIX

PAGINATION AS IN ORIGINAL COPY

INDEX

DOCKET ENTRIES

JUDGE/MAGISTRATE: Assigned Trial 0858 | 0208 1 District Office | Disp./Sentence

U.S. vs. LIND, PEDRO (defendant) | Day 22 | No. 01 | Year 76 | Docket No. 0083 02 | No. of Defnts 02

U.S. CODE SECTION	OFFENSES	COUNTS
18:1201(c)	Consp. to kidnap.	1
18:1201(a)	Kidnapping.	2
18:1202	Receipt & possess. of ransom money.	3
18:875(a)	Ransom for kidnapped person.	4
18:924(c)(1)	Use of firearm to commit a fed. felony.	5

MAGR. CASE NO. 76-84

BAIL • RELEASE: ☐ Denied ☐ Personal Recog. ☐ Unsecured Bond ☐ Conditional Release; AMT Set (000) $; ☐ 10% Deposit ☐ Surety Bond ☐ Collateral ☐ 3rd Party Custody ☐ PSA; date; ☐ Bail Not Made ☐ Bail Status Changed (See Docket)

U.S. Attorney or Asst.: Paul Vircarrondo

Defense: ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None ☐ Other ☐ FD ☐ CD: Martin E. Gotkin, Esq. 250 W. 57th St., N.Y.C. 10019 541-8390

ARREST: 1/19/76 U.S. Custody Began on Above Charges; ☐ High Risk Defn. & Date Design'd; ☐ Prosecution Deferred

INDICTMENT: ☒ Information 1-22-76; ☐ Waived; ☐ Superseding ☐ Indict./Info.

ARRAIGNMENT: 1-26-76; 1st Plea 1-26-76; Final Plea

TRIAL: Trial Set For 3-16-76; ☐ Not Guilty ☐ Nolo ☐ Guilty; Voir Dire 3-31-76; Trial Began 3-16-76 ☐ N.; ☐ Not Guilty ☐ Nolo ☐ Guilty; Trial Ended 3-23-76

SENTENCE: Disposition 4-26-76; ☒ Convicted ☐ On All Charges ☐ Acquitted ☐ On Lesser Offense(s) ☐ Dismissed: ☐ WOP; ☐ WP* ☐ Nolled/Discontinued*

		DATE	INITIAL/No.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant			
COMPLAINT		1/19/76	HJR-080D

INITIAL APPEARANCE 1/29/76 INITIAL/No. HJR-080D

PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled 1-29-76; Date Held; ☐ Waived ☐ Not Waived; ☐ Intervening Indictment

Tape No. INITIAL/No.

OUTCOME: ☐ Dismissed ☐ Held for District Ct. ☐ Held to Answer to U. S. District Court; BOND ☐ Exonerated ☐ To Transferee District; AT:; Magistrate's Initials

OFFENSE (In Complaint): 18 USC 1201,2-Kidnapping

• Show last names and suffix numbers of other defendants on same indictment/information: Pereira-1.

DATE	PROCEEDINGS	V. Excludable Delay (a) (b) (c) (d)
1-22-76	Filed indictment.	
1-26-76	Deft.(atty. present) Pleads not guilty. Bail fixed by Mag. at $100,000. continued. Mot. ret. in 10 days. Case assigned to Judge Stewart for all purposes. Ward,J.	
01-29-76	Interpreter and Atty. present. Pre-trial Conf. held. Trial set for 3-1-76 at 10 AM -- Stewart, J.	
02-05-76	Filed the following papers recd. from the office of Mag. Raby: docket sheet;complaint;disposition sheet;financial affdt. and sppt. of counsel(CJA) of Martin Gotkin of 250 W.57St,NYC 10019	
01-30-76	Filed defts. notice of appearance by: Martin Gotkin of 250 W.57St,NYC 10019.	
02-13-76	Filed defts. affdt. and notice of motion for the AUSA to file a bill of particulars,discovery,etc,ret. on: date to be fixed,by court.	

A

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER "SPEEDY TRIAL ACT"

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY (a) (b) (c) (d)
2-26-76	Filed govts. demand for notice of alibi defense and affdt. and notice fo motion for discovery,etc.	
2-26-76	Filed govts. memorandum of law in response to defts. omnibus motion.	
03-03-76	Deft. and atty. Martin Gotkinpresent. Motions heard,suppression hearing held. See official court reporters minutes. All motions, decision reserved. Stewart,J.	
02-24-76	Filed CJA copy # 2 authorizing payment to Norma Seltzer of 20 E.35 St,NYC 10016 for expert services on 1/28/76 in the amt. of $30.00. Orig. mailed to AO,Wash.,DC for payment.	
02-24-76	Filed CJA copy #5 authorizing payment to Norma Seltzer for expert servides. Stewart,J.	
03-09-76	Filed transcritp of record of proceedings dated 1/29/76.	
03-23-76	Filed defts. requests to charge.	
03-23-76	Filed defts. supplemantary request to charge.	
03-15-76	Deft. and atty. present. Pre-trial conference held. Deft. not present Stewart,J.	
03-16-76	Deft. and atty. present. Jury trial begun. Interpretar Manuel Ras,swor Stewart,J.	
03-17-76	Jury trial contd.	
03-18-76	" "	
03-19-76	"	
03-22-76	" "	
03-23-76	" " and concluded. Jury verdict finds deft. guilty as charged. PSI ordered. Sentence adj. to 4/26/76 at 10am. Deft, remanded,no bail. Stewart,J.	
03-31-76	Filed defts. request for the voir dire.	
03-29-76	Filed govts. memorandum of law opposing defts. use of the victim's juvenile adjudication to impeach her credibility.	
03-29-76	Filed govts. memorandum of law on the admissibility of evidence,etc.	
03-29-76	Filed govts. memorandum of law in opposition to defts. motion to suppre	
03-29-76	Filed govts. requests to charge.	
03-31-76	Filed OPINION # 44149--Before the trial inthis case, deft. moved to suppress certain items seized from an apt. We find nothing improper of the actions set forth above. So ordered,Stewart,J. m/n	
4-6-76	Filed CJA copy # 2 authorizing payment to Norma Seltzer of 20 E. 35 St,NYC for expert services as interpreter on 3/12/76 in the amt. of $30,00. Orig. mailed to AO,Wash.,DC for payment.	
4-6-76	Filed CJA copy #5 authorizing payment to Norma Seltzer for expert services. Stewart,J.	
4-28-76	Filed defts. affdt. and notice of motion todismiss indictment or for new trial,ret. on: April26,1976 at 10am.	
4-26-76	Filed JUDGMENT(atty. Martin Gotkin,present)--the deft. is hereby committed to the custody of the Atty. General or his authorized repras for imprisonment for a period of 40 YEARS on ct. 1; 40 YEARS on ct. 2 10 yrs. on CT. 3, 20 years on ct. 4 and 10 years on ct. 5. Sentance imposed on each of cts. 1 thru 5 inclusive are to run concurrently with each other. Stewart,J.(copies issued 4-28-76)	

B (see Pg. 3)

(a) Interval (per Section II)	(b) Start Date / End Date	(c) Ltr. Code	(d) Total Days

DOCKET ENTRIES

USA VS LIND STEWART,J. DEFT. # --2

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DATE	PROCEEDINGS
4-29-76	Filed memo end. on defts. motion dated April 28, 1976 for reduction of sentence--Motion is denied. So ordered, Stewart,J. m/n
4-28-76	Filed defts. notice of appeal to the USCA from the judgment of April 26, 1976.copies mailed to US Atty's. office and to deft. at the MCC,150 Park Row,NYC.
4-29-76	Filed CJA copy # 2 authorizing payment to Manuel Ras of [illegible]-07 21st Ave, Whitestone,NY 11357 for expert services as interpreter on 3/23/76 in the amt. of $393.83. Orig. mailed to AO,Wash.,DC for payment.
4-29-76	Filed CJA copy # 5 authorizing payment to Manuel Ras for expert services. Stewart,J.
4-28-76	LIND--Filed defts. notice of appeal to the USCA from the final judgment [illegible]6/76. Copies mailed to AUSA and to deft. at the MCC.
5-12-76	LIND-- Filed transcript of record of proceedings dated March 3, 1976.
5-7-76	LIND--Filed transcript of record of proceedings March 15,16,17,18,19, 22,23, 1976.
5-7-76	LIND: Filed transcript of proceedings dated Feb. 19-1976.
5-7-76	LIND-- Filed temporary commitment dated 1/19/76.
5-7-76	LIND--Filed CJA copy# 2 authorizing payment to Jack Trebout of 99 -52 66th Road,Forest Hills,NY 11375 Apt. 3-P for expert services on 4/26/76 as interpreter in the amt. of $30.00. Orig. mailed to AO, Wash,DC for payment.
5-6-76	Filed CJA copy # 5 authoring payment to Jack Trebout for expert services. Stewart,J.
5-17-76	Filed CJA Form # 21 copy #5 ppointing Norma S.Seltzer as interpreter for deft .....Ward,J.
5-27-76	Filed CJA Form # 21 copy #2 authorizing payment for Norma S.Seltzer as interpreter for deft dated 2-4-76....Ward,J.
May 18-76	Filed transcript of proceedings dated Apr 26-76.
May 18-76	Filed application via letter to Judge Stewart dated Mar 26-76 from Martin [illegible]. Gotkin.

I TRUE COPY RAYMOND F. [illegible], Clerk

By [signature] Deputy Clerk

MW:mp

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

: INDICTMENT

- v - : 76 Cr. 53

:

HECTOR LUIS PEREIRA
and PEDRO LIND, :

Defendants.

COUNT ONE

The Grand Jury charges:

1. From on or about the 13th day of January, 1976, up to and including the 14th day of January, 1976, in the Southern District of New York, HECTOR LUIS PEREIRA and PEDRO LIND, the defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to violate Section 1201 of Title 18, United States Code.

2. It was a part of said conspiracy that the defendants, HECTOR LUIS PEREIRA and PEDRO LIND, unlawfully, wilfully and knowingly would and did seize, confine, inveigle, decoy, kidnap, abduct and carry away and hold for ransom and reward and otherwise a person, and would and did wilfully transport said person in interstate commerce, to wit, from New Jersey to New York.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the defendants did commit the following overt acts, among others, in the Southern District of New York and elsewhere:

1. On or about the 13th day of January, 1976, the defendant, PEDRO LIND, drove a car containing Kathleen Ann Lutzen and the defendant, HECTOR LUIS PEREIRA, into New York, New York, from the George Washington Bridge.

2. On or about the 13th day of January, 1976, the defendants, HECTOR LUIS PEREIRA and PEDRO LIND, entered 14-16 Mount Hope Place, Bronx, New York, with Kathleen Ann Lutzen.

3. On or about the 14th day of January, 1976, at approximately 1:00 A.M., the defendant, HECTOR LUIS PEREIRA, made a telephone call from a public telephone in the Bronx, New York.

4. On or about the 14th day of January, 1976, the defendant, HECTOR LUIS PEREIRA, picked up an envelope containing approximately $2,000 in currency from under a taxicab parked in the vicinity of 176th Street and Jerome Avenue, Bronx, New York.

5. On or about the 14th day of January, 1976, the defendant HECTOR LUIS PEREIRA, walked out of 14-16 Mount Hope Place, Bronx, New York, with Kathleen Ann Lutzen.

(Title 18, United States Code, Section 1201(a).)

COUNT TWO

The Grand Jury further charges:

On or about the 13th day of January, 1976, in the Southern District of New York, HECTOR LUIS PEREIRA and PEDRO LIND, the defendants, unlawfully, wilfully and knowingly did seize, confine, inveigle, decoy, kidnap, abduct and carry away and hold for ransom and reward and otherwise a person, namely, Kathleen Ann Lutzen, and did wilfully transport said person in interstate commerce, to wit, from New Jersey to New York.

(Title 18, United States Code, Sections 1201(a) and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 14th day of January, 1976, in the Southern District of New York, HECTOR LUIS PEREIRA and PEDRO LIND, the defendants, unlawfully, wilfully and knowingly did receive, possess, and dispose of money, to wit, approximately $2,000 in currency, and a portion thereof, which had been delivered as ransom and reward in connection with a violation of Title 18, United States Code, Section 1201, to wit, the violation set forth in Count Two of this Indictment, knowing the same to be money which had been delivered as such ransom and reward.

(Title 18, United States Code, Sections 1202 and 2.)

COUNT FOUR

On or about the 14th day of January, 1976, in the Southern District of New York, HECTOR LUIS PEREIRA and PEDRO LIND, the defendants, did transmit in interstate commerce a communication, to wit, a telephone call from New York to New Jersey, containing a demand and request for a ransom and reward for the release of a kidnapped person, namely, Kathleen Ann Lutzen.

(Title 18, United States Code, Sections 875(a) and 2.)

COUNT FIVE

The Grand Jury further charges:

On or about the 13th day of January, 1976, in the Southern District of New York, HECTOR LUIS PEREIRA and PEDRO LIND, the defendants, did unlawfully, wilfully and knowingly use a firearm to commit a felony for which they

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may be prosecuted in a Court of the United States, to wit, the felony charged in Count Two of this Indictment.

(Title 18, United States Code, Sections 924(c)(1) and 2.)

FOREMAN

THOMAS J. CAHILL
United States Attorney

CHARGE OF THE COURT

Judge Stewart

THE COURT: Mr. Artesona, members of the jury, we have now come to that part of the case where the evidence is in, the lawyers have presented their arguments, and you are about to exercise your final role, and that is to pass upon and decide the fact issues that are in this case.

First, I want to express my thanks to each of you for your devotion to your duties, your patience, your attention.

It is now your responsibility to reach a just decision, and I know that you will deliberate towards reaching a verdict fairly, honestly and conscientiously.

I am going to say a few general words, most if not all of which you have heard me say before, but I think it is important at this time that you have them in mind.

It is your job as the exclusive judges of the facts to pass upon the weight of the evidence, to resolve whatever conflicts there may be in the evidence and to draw such reasonable inferences as may be warranted by the testimony, the exhibits, the evidence in the case.

My function now is to tell you what the law is, and it is your duty as jurors to accept what I tell you the law is; not what the lawyers have argued to you isthe law; not what you think the law may be or should be, but what I tell you the law is.

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With respect to any question of fact, as I have told you, it is not what the lawyers say the facts are, it is not what I say the facts are; it is what you determine the facts from your recollection of the testimony, the evidence.

The fact that the government is a party, that is, that the prosecution is brought in the name of the United States of America, entitles it to no greater weight, no greater consideration than that accorded to anybody else. And, by the same token, it is entitled to no less consideration.

You will remember that I told you that the indictment is simply a charge, an accusation. It is evidence of nothing. It does not prove anything about the guilt of the defendant, and you will give no weight in your considerations, in your deliberations, to the fact that there is an indictment against this defendant.

The defendant has pleaded not guilty; therefore, the government has the burden of proving beyond a

reasonable doubt by competent evidence the charges made against him. Whether this burden is sustained does not depend upon the number of witnesses, the quantity of the testimony but rather, on the nature and quality of the testimony.

It is a burden that never shifts, and remains upon the government through the entire trial,and is on the government right now as you are about to retire to deliberate.

The defendant does not have to prove his innocence. On the contrary, a defendant is presumed to be innocent of the accusations contained in the indictment and the government must prove a defendant's guilt beyond a reasonable doubt.

The defendant continues to be presumed to be innocent up to this point, and he continues to be presumed to be innocent only if and until you decide that the government has proven its case beyond a reasonable doubt.

It is because of this burden the government has that the defendant has no obligation to present any evidence to you. In fact, in this case, the defendant has not done so. That is the absolute right of the defendant, and you are not to consider that fact, that he put in no case on his own behalf, and you are to draw

absolutely no inferences from that whatsoever.

To repeat, the government has the heavy burden of establishing beyond a reasonable doubt that the defendant is guilty, before you can convict him. And, in addition, the defendant has a presumption of innocence which runs in his favor. It runs in his favor now, it runs in his favor during your deliberations.

I want to tell you briefly about the five counts in the indictment.

The first count, which I shall call the conspiracy count charges that from on or about the 13th day of January, 1976 up to and including the 14th day of January, 1976, Hector Luis Pereira and Pedro Lind -- and Pedro Lind is the defendant on trial before you -- conspired to violate the Federal Kidnapping Statute, Title 18 United States Code Section 1201.

The second count charges the defendant Lind with the actual kidnapping of Kathleen Ann Lutzen on or about January 13, 1976.

Count Three charges that Lind received a portion of the $2,000 ransom money delivered in connection with the kidnapping charged in Count Two.

Count Four charges the transmittal in interstate commerce of a communication, specifically, a telephone

call from New York to New Jersey containing a demand and request for a ransom for the release of a kidnapped person, Kathleen Ann Lutzen.

And finally, Count Five charges that the defendant used a firearm to commit the felony charged in Count Two of the indictment, that is, kidnapping.

I will call Counts Two through Five the substantive charges; Count One the conspiracy charge.

Each of the substantive counts also charges that the defendant aided and abetted the commission of the crime alleged in that count. I will discuss the aiding and abetting statute with you a little bit later on.

The substantive counts and conspiracy count in some respects are governed by different principles. Generally speaking, a substantive count charges a violation of the law which condemns specific conduct as illegal; for example, kidnapping.

On the other hand, in a conspiracy count the offense charged is an agreement or understanding of two or more persons to commit a violation of a particular substantive law; in this instance the federal law pertaining to kidnapping.

In a conspiracy charge there is no need to

prove a specific violation of the kidnapping law. Conspiracy, which is collective criminal activity, is usually more difficult to detect than the illicit or criminal activity of a single individual.

For this and other reasons, Congress has made a conspiracy, or concerted action between two or more persons to violate the federal laws, a separate crime entirely distinct from the substantive crime which may be the underlying objective of the conspiracy.

On the other hand, a substantive count is one under which specific action is condemned, as for example, Count Two of this indictment which charges the defendant here with kidnapping.

In short, the conspiracy charge relates to the unlawful agreement to kidnap, whereas the substantive crime refers to the actual or completed agreement. Since the essential elements which the government must prove before a conviction may be had are different in the instance of each crime, we will consider each separately.

First, the conspiracy count. The count reads:

Paragraph 1. From on or about the 13th day of January, 1976 up to and including the 14th day of January, 1976, in the Southern District of New York, Hector Luis Pereira and Pedro Lind, the defendants,

unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together with one another, to violate Section 1201, Title 18 United States Code.

It was a part, this is Paragraph 2:

It was a part of said conspiracy that the defendants Hector Luis Pereira and Pedro Lind, unlawfully, wilfully and knowingly would and did seize, confine, inveigle decoy, kidnap, abduct and carry away and hold for ransom and reward and otherwise, a person, and would and did wilfully transport said person in interstate commerce, to wit, from New Jersey to New York.

There is another part of Count One which I will come to in a few moments which deals with overt acts, and I will explain that to you shortly.

There are three essential elements of the conspiracy charge. The government must prove each of these elements beyond a reasonable doubt. And I will explain to you also in a few moments what I mean by beyond a reasonable doubt.

If it fails to establish any essential element beyond a reasonable doubt, you must acquit the defendant. If the government succeeds, on the other hand, it is your duty to convict.

These three elements as to the first count

are as follows:

First, that sometime between approximately January 13, 1976 and January 14, 1976 an agreement or understanding existed between Hector Luis Pereira and Pedro Lind, the defendant on trial before you, to commit at least one of the crimes alleged in Count 1, to wit, wilfully and knowingly seizing, confining, inveigling, decoying, kidnapping, abducting and carrying away and holding for ransom and reward and otherwise, a person, and wilfully transporting that person in interstate commerce.

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In short, the government must prove that a conspiracy existed to kidnap a person and hold that person for ransom or some other purpose.

Second, this is the second element, that the defendant knowingly and willfully became a participant in the conspiracy with knowledge of at least one of the criminal purposes.

Third, that one of the conspirators, not necessarily the defendant, Pedro Lind, knowingly committed in the Southern District of New York, at least one of the overt acts in the indictment at about the time alleged in furtherance of the conspiracy.

I will come back to the overt acts.

I instruct you, incidentally, that Manhattan and the Bronx, are in the Southern District of New York.

Now, what is a conspiracy?

The idea of a conspiracy is very simple. It is a combination, agreement, or understanding of two or more persons to accomplish criminal purposes. In this case the government contends the purpose of the conspiracy was to violate the law with respect to kidnapping. The gist of this crime is the unlawful combination or agreement to violate the law, and it does not matter whether or not it succeeded.

Conspiracy has sometimes been called a partnership

in criminal purposes in which each member becomes the agent of every other member.

To establish a conspiracy, the government is not required to show that two or more persons sat around a table and entered into a solemn or formal pact orally or in writing, stating that they formed a conspiracy to violate the law. Indeed, it would be extraordinary if there ever was such a formal document or a specific oral agreement.

From its very nature a conspiracy is almost invariably secret in its origin and execution. Express language or specific words are not required to indicate assent or attachment to a conspiracy.

When persons, in fact, undertake to enter into a criminal conspiracy, much is left to unexpressed understanding.

You must first determine whether or not the proof establishes the existence of a conspiracy as charged in the indictment.

In deciding this, the first element, as I have said, it is sufficient for two or more persons in any manner through any contrivance, impliedly or tacitly, to come to a common understanding to violate the law.

In determining whether the conspiracy charged in this indictment actually existed, you may consider the evidence of the acts and conduct of the alleged conspirators

as a whole and reasonable inferences to be drawn from such evidence.

If upon such consideration of the evidence, you find beyond a reasonable doubt, that the minds of the conspirators met in an understanding way, and that they agreed, as I have explained, to work together in furtherance of the unlawful scheme alleged in Count 1, then proof of the existence of the conspiracy is complete.

If you do conclude that a conspiracy as charged did exist, you must next determine the second element of the conspiracy charged; whether the defendant Pedro Lind was a member.

You will determine this from the proof in the case. You must consider the defendants alleged participation separately from that of his alleged co-conspirator, and you must make a separate determination as to this defendant.

However, in so doing, you should consider all the evidence, the acts and statements if any of this defendant, as well as the acts and statements of the other alleged co-conspirator.

Specifically, you should understand that the mere association of a defendant with an alleged co-conspirator does not establish his participation in a conspiracy if you find one did exist.

So, too, mere knowledge by a defendant of a conspiracy or the illegal act on the part of another alleged co-conspirator is not sufficient to establish membership.

To find the defendant here guilty of conspiracy, you must be satisfied that he knowingly and willfully joined the conspiracy with the intent and purpose of furthering its object.

The question of intent is one of fact. Clearly, this concerns what is in one's mind and the purpose which motivates a person in the course of conduct.

We have not yet devised an instrument to record intent. It is a mental process. Usually concrete proof, if ever, is not available. Intent and motive are determined from the acts, the conduct, the circumstances, and such reasonable inferences as may be drawn therefrom.

If you find circumstances of secrecy, intrigue, or deviousness, or attempts to conceal the real nature of the transaction, you may consider these along with other evidence in the case as showing a consciousness of guilt.

Also, you should bear in mind another principle of the law of conspiracy:

When people enter into a conspiracy to accomplish an unlawful end, each becomes an agent for all the others in carrying out the unlawful conspiracy; hence, the acts and declarations of one in the course of the conspiracy and in

furtherance of the common purpose, are deemed to be the acts of all, and all are responsible for such acts.

Accordingly, if you find that the alleged conspiracy existed, of which the defendant here and another were alleged participants, then acts done and statments and declarations made in furtherance of the conspiracy by any member of the conspiracy, may be considered against the other, even though such acts and declarations were made in the absence and without the knowledge of the defendant.

The question is:

Did the defendant join another in conspiracy with awareness of at least some of its basic purposes and aims. If so, then the law treats him as a full member of the conspiracy and he becomes liable for the acts of the other conspirator.

Thus, if you find that the defendant is a conspirator, then, however limited his role in furthering the objectives of the conspiracy, he is responsible for all that was done in furtherance thereof during its continuance.

Now, the third essential element of the crime of conspiracy is that an overt act to effect the object of the conspiracy be committed by at least one of the co-conspirators after the unlawful agreement has been entered into.

An overt act is any step, action or conduct which

is taken to achieve, accomplish or further the objective of the conspiracy.

The purpose of requiring proof of one overt act is that while parties may conspire and agree to violate the law, they may change their minds; they may do nothing to carry it into effect, in which event it would constitute no offense.

The overt act itself need be neither a criminal act nor the very crime which is the object of the conspiracy. It need not have been committed by the defendant here, Mr. Lind, but rather, could be committed by his alleged co-conspirator, Mr. Pereira.

The overt acts alleged in the indictment as part of Count 1 are as follows:

In furtherance of said conspiracy and to effect the objects thereof, the defendants did commit the following overt acts among others in the Southern District of New York and elsewhere:

1. On or about the 13th day of January, 1976, the defendant Pedro Lind drove a car containing Kathleen Ann Lutzen and the defendant Hector Luis Pereira into New York from the George Washington Bridge.

2. On or about the 13th day of January, 1976, the defendants Hector Luis Pereira and Pedro Lind entered

1416 Mount Hope Place, Bronx, New York, with Kathleen Ann Lutzen.

3. On or about the 14th day of January, 1976, at approximately 1 a.m., the defendant Hector Luis Pereira made a telephone call from a public telephone in the Bronx, New York.

4. On or about the 14th day of January, 1976, the defendant Hector Luis Pereira picked up an envelope containing approximately $2,000 in currency from under a taxicab parked in the vicinity of 176th Street and Jerome Avenue, Bronx, New York.

5. On or about the 14th day of January, 1976, the defendant Hector Luis Pereira walked out of 1416 Mount Hope Place, Bronx, New York, with Kathleen Ann Lutzen.

Again, it is not necessary for the government to prove that each member of the conspiracy, if you find that a conspiracy existed, committed or participated in any particular overt act, since the act of any one done in furtherance of the conspiracy, becomes the act or acts of all the members.

Also, the government is not required to prove each of the overt acts. It is sufficient, if the government proves the commission of at least one of the acts set forth in the indictment on or about the time alleged.

It need not have occurred at the precise time or the precise place alleged therein.

Also, while the indictment alleges that the conspiracy began from on or about January 13, 1976 and continued to on or about January 14, 1976, it is not essential for the government to prove that the conspiracy started and ended on or about those specific dates.

It is sufficient if you find that in fact a conspiracy was formed and existed for some period of time within the period set forth in the indictment and at least one of the overt acts was committed during that period.

The offense of conspiracy is complete when the unlawful agreement is made and any single overt act in furtherance of the conspiracy is committed by at least one of the conspirators. It is not necessary for completion of this crime that the conspirators succeed in carrying out the conspirators' unlawful purpose.

Thus, in order to prevail under the conspiracy count, the government must establish by the required degree of proof as I have spelled it out to you, the existence of the unlawful agreement, that the defendnat Pedro Lind knowingly and willfully associated himself with the conspiracy and the commission of at least one overt act in furtherance thereof.

If the government succeeds,your verdict on the

conspiracy count, Count 1, should be guilty. If the government fails, your verdict should be not guilty.

Now, as to Count 2. It reads as follows:

On or about the 13th day of January, 1976, in the Southern District of New York, Hector Luis PEreira and Pedro Lind, the defendants, unlawfully, willfully and knowingly did seize, confine, inveigle, decoy, kidnap, abduct and carry away and hold for ransom and reward and otherwise, a person, namely Kathleen Ann Lutzen, and did willfully transport said person in interstate commerce, to wit, from New Jersey to New York.

To find the defendant Pedro Lind guilty on the second count you must find each of the following elements beyond a reasonable doubt.

First, on the 13th day of January, 1976, the defendant, Pedro Lind unlawfully seized, confined, decoyed, inveigled, kidnapped, abducted or carried away Kathleen Ann Lutzen, and he did so without her consent.

Second, that in doing so, the defendant transported Kathleen Ann Lutzen in interstate commerce, that is from one state to another, here, from New Jersey to the Southern District of New York.

Third, that the defendant held the victim, Miss Lutzen, for ransom, reward or otherwise.

Four, that the defendant did these acts

knowingly and willfully.

The first element of Count 2 is that the defendant unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted or carried away the victim, Kathleen Ann Lutzen.

Kidnapped, means to take and carry away a person by force and against that person's will.

Inveigle means to lure or entice or lead astray by false representation or promises or other deceitful means.

Decoy means enticement or a luring by means of fraud, trick or temptation.

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Seize, confine, abduct, and carry away, all denote the taking and carrying away or holding of a person by force without that person's consent, thus, under this first element, the second count, you must find beyond a reasonable doubt that the defendant unlawfully took and carried away or held the victim, held Kathleen Ann Lutzen by force or by the type of enticement I have described and did so without her consent and against her will.

The second element of this count is that the defendant transported the victim, Miss Lutzen, in interstate commerce from New Jersey to New York.

When I say "the victim", you understand that I am talking only about the person alleged in the indictment to have been involved in this matter.

It is sufficient on this element if you find beyond a reasonable doubt that the defendant transported Miss Lutzen across state lines.

It is not necessary to prove that the defendant knew he was taking her across state lines or that he intended to take her from one state to another. It is sufficient if the government proves beyond a reasonable doubt that the defendant wilfully and knowingly transported her from one point to another and in so doing he cross

a state line.

The third element you must find beyond a reasonable doubt, still with respect to Count 2, is that the defendant held her for ransom, reward, or otherwise.

Thus, while it is sufficient to find that the defendant held Miss Lutzen at least, in part, for pecuniary gain, it is also sufficient on this element if you find beyond a reasonable doubt that she was held against her will, in whole or in part, for a reason other than pecuniary gain, such as for sexual gratification.

The government contends that the evidence at trial shows that the defendant Pedro Lind held Miss Lutzen in part for a share of the $2,000 ransom that wax collected from her father and in part for his own sexual gratification.

If you find beyond a reasonable doubt the defendant held her for either one or both of these reasons, this element of Count 2 is satisfied.

In order to convict on any count you must find beyond a reasonable doubt that the defendant's alleged offense was committed wilfully and knowingly. An act is done knowingly if it is done voluntarily and purposely and not because of mistake, mere negligence or other innocent reasons. An act is done wilfully if it is done

knowingly and deliberately.

"Wilful" does not mean that a defendant in addition to knowing what he is doing must also suppose he is breaking the law.

The third count of the indictment reads:

On or about the 14th day of January, 1976, in the Southern District of New York, Hector Luis Pereira and Pedro Lind, the defendants, unlawfully, wilfully and knowingly did receive, possess and dispose of money, to wit, approximately $2,000 in currency and a portion thereof, which had been delivered as ransom and reward in connection with a violation of Title 18 United States Code, Section 1201, to wit: A violation set forth in Count 2 of this indictment, knowing the same to be money which had been delivered as such ransom or reward.

To find the defendant Pedro Lind guilty on Count 3 you must find each of the following elements beyond a reasonable doubt:

First, that the violation of the section to which I have just referred, which is charged in Count 2, occurred. You need not find that the defendant is guilty of the crime charged in Count 1 but you must find that somone committed the kidnapping alleged in Count 2.

If you find that no kidnapping occurred as charged in Count 2, you must acquit the defendant Pedro Lind on Count 3.

Second, that money or other property was delivered as ransom or reward in connection with the kidnapping charged in Count 2 of the indictment.

Third, that on or about January 14, 1976, in the Southern District of New York, the defendant Lind wilfully and knowingly received, possessed, or disposed of said money or other property or any portion of it knowing that it was money or property that had been delivered as ransom or reward in connection with the kidnapping.

Count 4 reads as follows:

On or about the 14th day of January, 1976, in the Southern District of New York, Hector Luis Pereira and Pedro Lind, the defendants, did transmit in interstate commerce a communication, to wit, a telephone call from New York to New Jersey containing a demand and request for a ransom or reward for the release of the kidnapped person, namely Kathleen Ann Lutzen.

To find the defendant Pedro Lind guilty on Count 4 you must find each of the following elements beyond a reasonable doubt:

First, that on or about January 14, 1976, in the Southern District of New York, the defendant transmitted in interstate commerce a communication, specifically a telephone call from New York to New Jersey.

Second, that this communication contained a demand or request for a ransom or reward for the release of a kidnapped person, Kathleen Ann Lutzen.

Third, that the defendant acted wilfully and knowingly.

Finally, Count 5 reads as follows:

On or about the 13th day of January, 1976, in the Southern District of New York, Hector Luis Pereira and Pedro Lind did unlawfully, wilfully and knowingly use a firearm to commit a felony for which they may be prosecuted in a Court of the United States, to wit, the felony charged in Count 2 of this indictment.

To find the defendant Pedro Lind guilty on Count 5 you must find each of the following elements beyond a reasonable doubt:

First, that the defendant committed the kidnapping charged in Count 2. You will consider whether the defendant is guilty on Count 5 only if you have found him guilty on Count 2.

Second, that on or about January 13, 1976,

in the Southern District of New York, the defendant used a firearm, a gun, to commit the kidnapping charged in Count 2. The firearm need not have been fired but must have been used by the defendant in some manner to enable him to commit the kidnapping.

Third, that the defendant acted wilfully and knowingly.

Now there is one other statute that I must discuss with you.

Any person who commits the acts that each of the statutes charged in the substantive counts, Counts 2 through 5 declared to be a crime, of course, commits a crime.

It is also a crim,e however, not only to commit the illegal acts to which I have just referred, but to aid or abet or procure or induce another person to commit such acts. This is based on the aiding and abetting statute, as it is called, Section 2 of Title 18, which reads as follows:

Whoever commits an offense against the United States or aid, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

This statute therefore provides that a person who aids and abets another to commit an offense

is just as guilty of that offense as if he committed it himself.

Accordingly, you may find the defendant guilty of the offense charged in any substantive count of this indictment if you find beyond a reasonable doubt that another person committed the offense charged in that count and that the defendant Lind aided and abetted that person in effectuating it.

To determine whether the defendant aided and abetted the commission of the offense, you should ask yourselves these questions:

Did he associate himself with the venture? Did he participate in it as something he wished to bring about? Did he seek by his actions to make it succeed? If he did then he is an aider and abettor.

Of course to find the defendant guilty of aiding and abetting you must find something more than mere knowledge on his part that a crime was being committed, for a mere spectator at a crime is not a participant.

In order to convict it is not necessary that you find that the defendant himself did all of the criminal acts since participation in the crime can be found if you find he aided and abetted, he assisted another in committing it.

For example, if you find on Count 4 that Hector Luis Pereira actually made the interstate telephone call to Warren Lutzen demanding the payment of a ransom for the release of his daughter, and if you also find beyond a reasonable doubt that the defendant Lind helped Pereira bring the kidnapped victim, Kathleen Ann Lutzen, to the public telephone so she could speak to her father on the phone so as to induce him to comply with the ransom demands that Pereira made in that same telephone call, then you may find the defendant Pedro Lind guilty on Count 4.

Now I have used in these instructions the phrase "beyond a reasonable doubt" several times. What is a reasonable doubt?

A reasonable doubt is one which appeals to your reason, to your judgment, to your common sense, and to your experience. It is not impulse, whim, or speculation. It is not an excuse to avoid the performance of an unpleasant duty nor sympathy for a defendant. On the contrary, it is a doubt which a reasonable person has, after carefully weighing all the evidence.

A reasonable doubt may arise not only from the evidence presented but also from the lack of evidence since the burden is always upon the prosecution to prove

the defendant, the accused, guilty beyond a reasonable doubt.

The defendant, as I have told you, has a right to rely upon the failure of the prosecution to establish every element of the crime or crimes with which he is charged beyond a reasonable doubt.

If after a fair and impartial consideration of all the evidence in the case, or the lack of it, you can honestly say you have such a doubt as would cause prudent persons to hesitate before acting in matters of importance to themselves, then you have a reasonable doubt, and then it is your duty to acquit.

On the other hand, if after a fair and impartial consideration of all the evidence you can honestly say you are convinced of the guilt of the defendant with such conviction that you would be willing to act upon it in important and weighty matters in your personal affairs, then you have no reasonable doubt and under that circumstance it is your duty to convict.

One final word. Beyond a reasonable doubt does not mean beyond all possible doubt. If that were the rule few pepple would be convicted.

Consequently, the law in a criminal case is that it is sufficient if the guilt of a defendant is

established beyond a reasonable doubt. It follows that if after considering all the evidence in the case or the lack of evidence you find that the proof with respect to the defendant is as consistent with innocence as it is with guilt, or that it is only less likely that the defendant is innocent then guilty, then he should be acquitted.

If you find that the law has not been violated you should not hesitate for any reason to find a verdict of not guilty. But, on the other hand, if you should find that the law has been violated you should not hesitate, as I have said, because of sympathy or for any other reason to render a verdict of guilty.

Generally speaking, there are two kinds of evidence. One is called direct and the other is called circumstantial.

Direct evidence is where a witness testifies to what he saw, what he heard, what he observed, what he knows of his own knowledge.

Circumstantial evidence is evidence of acts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind.

Circumstantial evidence is the evidence which

tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to a a conclusion that those facts exist which are sought to be established. Circumstantial evidence, if believed, is of no less value than direct evidence for in either case you must be convinced beyond a reasonable doubt.

A simple example which is always used in this courthouse of circumstantial evidence: Let's assume that when you entered the courthouse this morning the sun was shining brightly. It was a clear day. No rain. Now let's assume when you came into the courtroom the blinds were drawn so you could not look outside. While you were sitting in the jury box somebody walks in with an umbrella dripping wet, somebody else comes in with a dripping raincoat. You can't look out the courtroom and you can't see whether it is raining. You can't say it is but you know of your own observation that it is raining.

On the facts I have just related it would be reasonable and logical for you to conclude that it is now raining.

That is about all there is to circumstantial evidence. You can infer on the basis of reason and experience of established facts the existence of some other fact.

It is your job to determine the credibility of the witnesses. How do you determine their credibility?

Well, you use your own plain everyday common sense. You have seen the witnesses. You have observed them, their manner. Whatever credit you may give to the testimony of a witness must be determined by your observation of them, of their conduct, of their manner of testifying and their relationship or interest in the matter.

An interested witness is not well unworthy of belief. It is a factor, however, which you may consider in determining the weight and credibility to be given to his testimony. If you find that any witness has wilfully testified falsely as to any material fact, you may disregard all of that witness' testimony or accept only that part of it which you believe, and reject what you disbelieve.

A witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony. Admissions of the defendant are among the most effectual proofs in the law, and constitute strong evidence against the party making them. Strong evidence as to the facts stated in those admissions.

You have heard testimony by Special Agent Harold Gossett and by Jose Ocana that the defendant made a statement after he was arrested. If you find that the defendant did make the statement, then you may give that statement such weight as you believe it deserves, after considering all the circumstances that were brought out in the evidence.

The flight of a defendant or his alteration of his appearance immediately after it is discovered that a crime has been committed is a fact which, if proved, may tend to prove consciousness of guilt on the part of a defendant, and may be considered and weighed by the jury in connection with all the other evidence. Whether or not evidence of flight or of the defendant's alteration of his appearance shows a consciousness of guilt and the significance if any to be attached to such circumstances are matters for your deliberation.

The flight of a defendant or the alteration of his appearance of his appearance does not constitute a presumption of guilt. It is merely a fact to be considered by you together with all the other evidence in determining the guilt or innocence of a defendant.

You have heard expert testimony. The general rule is that witnesses are permitted to testify only as

to facts and may not express their opinions. The exception to this rule is the opinion of a qualified expert in some particular technical matter.

The expert may testify as to his opinion on a subject concerning which he has special knowledge. You may consider the expert's qualifcations and opinion, weigh his reasons, if any, and give his testimony such weight as you feel it deserves.

Expert opinion is purely advisory, and you may reject it entirely if in your judgment the reasons given for it are not convincing or sound. The actual determination in this case rests with you, not with the experts.

The procedures of the Court to compel witnesses to testify here is equally applicable to both sides, the government and the defendant.

If the potential witness could have been called by the government or by the defendant and neither side call him, then you may infer that the testimony of the absent witness might have been unfavorable either to the government or to the defendant or to both.

On the other hand, it is equally within your province to draw no inference at all from the failure of either side to call a witness.

The indictment is in five counts. Each count constitutes a separate crime. Whiel there are facts and elements common to more than one count, you must nevertheless consider each count separately and return a separate verdict of guilty or not guilty to each count in the indictment.

You may not allow a consideration of the punishment which may be inflicted upon the defendant if convicted to influence in any way your verdict or to enter into your deliberations in any way. The duty of imposing sentence if there is a conviction is entirely upon me and it is not your function in any way to consider it.

Once again, if you fail to find beyond a reasonable doubt as to any element of any of the counts that the defendant has violated the law, you should not hesitate for any reason to find a verdict of acquittal on that count.

On the other hand, if you find that the law has been violated under the rules and instructions that I have given you, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

The purpose of your deliberations will be to

exchange views, to discuss and consider the evidence, to listen to each other's arguments, present your own views, and, finally, if you can, to reach a unanimous verdict to each count, based solely and wholly on the evidence, and without violence to your own individual judgment.

Each of you must decide this case for yourselves, but do so only after an impartial consideration of theevidence in the case with your fellow jurors. Don't hesitate to re-examine your own views, to change your opinion when after discussion you think your own views are in error.

But if after carefully considering all of the evidence in the case and the arguments of your fellow jurors, you hold a conscientious view which differs from the others, you are not to yield your view simply because you are out-numbered.

If in the course of the deliberations you need to examine any of the exhibits, desire to have any of the evidence read back to you, wish to see the indictment, anything else you would like from me, Mr. Artesona, will you please give the marshal a note telling me what you would like, and we will be glad to do whatever we can tohelp you.

In sending me a note, Mr. Artesona, do not indicate to me in any way what your vote is at the moment. I have told you that your verdict must be unanimous, either not guilty or guilty and must be on each of the five counts.

I think, members of the jury, your oath which I am sure you recall, sums up your duty: Without fear or favor to anyone, you will truly try the issues between this defendant and the government, based solely on the evidence and the Court's instructions as to the law.

This is important to the government, it is important to the defendant.

All right, gentlemen.

MR. GOTKIN: No exceptions, your Honor.

MR. VIZCARRONDO: I have none,your Honor.

MR. GOTKIN: Excuse me, your Honor. No exceptions except as previously set forth.

THE COURT: Thank you. Miss Kemore, Mr. Tenabrusso, we are happy to have you with us, we appreciated your attention, your patience, your willingness to serve. I am sorry to say we do not need you any longer. You are excused.

(The two alternate jurors were discharged and left the courtroom)

(At 4:32 p.m. a marshal was duly sworn)

(At 4:33 p.m., the jury retired to deliberate)

(Recess)

JUVENILE AID BUREAU CARDS FROM
PARAMUS POLICE DEPARTMENT (3)

Police Department
Paramus, New Jersey

JUVENILE-AID-BUREAU
INFORMATION FILE CARD CASE# C- 40711

NOTE FOR "INFORMATIVE PURPOSES" THIS INFORMATION FILE CARD SHALL BE FILLED OUT IN LIEU OF A WRITTEN REPORT AND SUBMITTED WITH EACH REPORT, PERTAINING TO JUVENILE CONTACT.

NAME: Lutzen, Kathleen
(Last) (First) (Middle)

ADDRESS: 247 Hillside Ave., Paramus, N. J.

SCHOOL: East Brook Jr. High GRADE:

RACE: Cau SEX: F HGT: 65 WGT: 115 EYES: Blue HAIR: Brn

COMPLEXION: Fair AGE: 12 D.O.B.:

Name of:*

FATHER: MOTHER:

HOME PHONE: 262 2845 BUS. PHONE:

NATURE OF INCIDENT: Runaway

DATE: 10-8-71 TIME: 9:30P OFFICER: Hanley

FACTS OF INCIDENT, ETC.

On 10-5-71 at 12:00PM she left her home w/o permission and remained away until 10-8-71 at 9:30P

*DISPOSITION OF INCIDENT: 1Rep/rel

JUVENILE AID BUREAU CARDS FROM
PARAMUS POLICE DEPARTMENT (3)

Police Department *Juvenile Aid Bureau*
Paramus, New Jersey **Information File Card** CASE# C- 90435 16A

NOTE FOR "INFORMATIVE PURPOSE" THE INFORMATION FILE CARD SHALL BE FILLED OUT IN TRIPLICATE AND SUBMITTED WITH EACH REPORT, PERTAINING TO JUVENILE CONTACT.

NAME: Lutzen (Last) Kathy (First) A. (Middle)

ADDRESS: 247 Hillside Avenue Paramus

SCHOOL: Paramus High School GRADE: 11

RACE: Cau SEX: F HGT: 5'7 WGT: 115 EYES: Blue HAIR: Lt. Brn

COMPLEXION: Fair AGE: 15 D.O.B.: 12-18-58

Name of:

FATHER: Waren MOTHER: Helen

HOME PHONE: 262-2845 BUS. PHONE:

NATURE OF INCIDENT: D.P. Alcohol

DATE: 8-2-74 TIME: 9;30 pm OFFICER: Pat'l Albro

NATURE OF INCIDENT, ETC.

DISPOSITION OF INCIDENT: R/R

JUVENILE AID BUREAU CARDS FROM
PARAMUS POLICE DEPARTMENT (3)

Police Department
Paramus, New Jersey

JUVENILE AID BUREAU
INFORMATION FILE CARD

CASE# C. 108332 74

CAUTION: FOR INFORMATIVE PURPOSES THIS INFORMATION FILE CARD SHALL BE FILLED OUT IN SITUATIONS WHEN AID WAS RENDERED WITH EACH PERSON, PERTAINING TO ANY JUVENILE CONTACT.

NAME: LUTMEN, (Last) Kathleen (First) A. (Middle)

ADDRESS: 247 Hillside Avenue Paramus, New Jersey

SCHOOL: Paramus High School GRADE: 11

RACE: W SEX: F HGT: 5'7" WGT: 124 EYES: Blu HAIR: Brn

COMPLEXION: ____ AGE: 16 D.O.B.: 12-16-58

FATHER'S NAME: Warren MOTHER'S NAME: Helen

HOME PHONE: 262-2845 BUSINESS PHONE: ____

NATURE OF INCIDENT: DP/Hitch-hiking/ O.N.U.F.P. (4-10-75)

DATE: 5-16-75 TIME: 4:45/P M. OFFICER: Det. Quiroga

FACTS OF INCIDENT, ETC.

DISPOSITION OF INCIDENT: Court